

DELAWARE STATE BAR ASSOCIATION  
COMMITTEE ON PROFESSIONAL ETHICS

OPINION 1979-1

A Delaware law firm ("the Firm") requests this Committee's opinion on the propriety of a certain representation.

The facts are complex but they boil down to this: The Firm has long represented a business entity ("Trans Corp") which is in competition with another entity, a close corporation ("X Corp"), owned primarily by two individuals. Both such entities are competitors in a regulated industry. The Firm has never represented X Corp but it has long represented X Corp's principals both personally and for other business matters. With regard to X Corp itself, the Firm has given legal advice to one of the principals in relation to his participation in its formation.

X Corp and Trans Corp now oppose each other in an administrative proceeding because X Corp must obtain certain regulatory approvals to survive and Trans Corp wants to oppose such approvals.

Trans Corp does not oppose the Firm representing the principals of X Corp either personally or in other business matters. The principals of X Corp, however, oppose the Firm acting for Trans Corp in the regulatory matter. They contend that the Firm knows their personal finances and their individual strengths and weaknesses, all of which they believe may be relevant to the regulatory authority's decision on the matters in question.

Question

May the Firm ethically represent Trans Corp in opposing X Corp's application for regulatory approval?

Answer

If facts (not generally and publicly available) were accessible to the Firm in their representation of the principals of X Corp and such facts might be relevant to the administrative proceedings with regard to the grant to X Corp of regulatory approvals, the Firm may not ethically represent Trans Corp in administrative proceedings relating to such approvals. If no such facts will be relevant, such representation is not unethical.

### Discussion

A lawyer may not, without consent, reveal the confidences of his clients, let alone use such confidences against him. (Canons 4, 5 and 9). The Firm has gained access to knowledge of the character and financial capability of the principals while in an attorney/client relationship. It would undermine the confidence of the public in the bar if such confidences and matters made accessible during such representation were to be subject to use by a lawyer while in a position adverse to the interests of a former client. Emle Industries, Inc. v. Pate Inc., 478 F.2d.562 (2d Cir. 1973); General Motors v. City of New York, 501 F.2d 639 (2d Cir. 1974).

On the other hand, if the matters to which the Firm has had access are totally irrelevant to the proposed representation, the inhibiting factors do not exist and the representation is ethical. Compare T. C. Theatres Corp. v. Warner Bros., 113 F.Supp. 265 (S.D.N.Y. 1953). If the matter is doubtful, the Firm should act conservatively and decline the representation. R. Wise, Legal Ethics, 1970 Ed.r p.256; Bull v. Celanese 513 F.2d 568 at 571 (2d Cir. 1975).

It is frequently said that a lawyer should, under certain circumstances not take any positions adverse to a former client irrespective of whether the matter under consideration involves previous attorney/client confidences. That principle, if correct, is not relevant here since the Firm has never represented X Corp, the party which Trans Corp plans to oppose.

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